

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS LEONARD PARKS,

Defendant-Appellant.

UNPUBLISHED

August 7, 2007

No. 270652

Hillsdale Circuit Court

LC Nos. 05-290633;

05-290634

Before: Smolenski, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his concurrent prison sentences of 83 to 180 months imposed on his plea-based convictions of breaking and entering with intent to commit a larceny, MCL 750.110. We vacate defendant's sentences and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to two counts of breaking and entering with intent to commit a larceny in exchange for dismissal of other charges and the prosecutor's agreement to forego lodging additional charges. The statutory sentencing guidelines, as scored by the trial court, recommended a minimum term range of 34 to 83 months for each conviction.¹ The trial court scored Offense Variable (OV) 9, MCL 777.39, number of victims, at ten points for two to nine victims. Defendant did not object to the scoring of the guidelines at sentencing. The trial court sentenced defendant to concurrent terms of 83 to 180 months in prison.

Defendant moved for resentencing in the trial court, arguing that OV 9 was incorrectly scored at ten points because the victims sustained only financial injuries.² Defendant asserted that the plain language of MCL 777.39 indicated that the Legislature intended OV 9 to apply only in cases in which victims were placed in danger of physical injury.³ Defendant relied on

¹ The guidelines were calculated to account for defendant's status as a second habitual offender, MCL 769.10. See MCL 777.65.

² Defendant also challenged the scoring of OV 13, MCL 777.43, continuing pattern of criminal behavior, at 25 points. Defendant does not pursue this challenge on appeal.

³ At the time of sentencing in this case, OV 9 provided that "each person who was placed in
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People v Melton, 269 Mich App 542; 711 NW2d 430 (2006). Defendant acknowledged that *People v Knowles*, 256 Mich App 53; 662 NW2d 824 (2003), held that OV 9 was properly scored in cases in which only financial injury occurred, but noted that this Court had convened a special panel to resolve the conflict between *Knowles, supra*, and *Melton, supra*. The trial court, relying on *Knowles, supra*, denied defendant's motion for resentencing in its entirety.

The proper interpretation and application of the statutory sentencing guidelines are legal questions that we review de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

Defendant argues that the trial court erred in scoring OV 9 at ten points, and asserts that had OV 9 been scored at zero points, the sentencing guidelines would have recommended a minimum term range of 29 to 71 months. Defendant concludes that because his minimum terms of 83 months exceed the correctly scored guidelines, he is entitled to resentencing.⁴ We agree.

We vacate defendant's sentences, and remand this matter to the trial court for resentencing under properly scored guidelines. In *People v Melton*, 271 Mich App 590, 594-596; 722 NW2d 698 (2006), a special panel of this Court overruled *Knowles, supra*, and held that OV 9 cannot be scored for a financial injury. In this case, the occupants of the residences into which defendant broke and entered were not at home at the time defendant committed the offenses. Therefore, the only injuries the victims sustained or could have sustained were financial in nature. Under these circumstances, OV 9 cannot be scored. *Melton, supra* at 594-596. The trial court should have scored OV 9 at zero points.

We decline plaintiff's invitation to apply *Melton, supra*, only prospectively. Generally, judicial decisions are given full retroactive effect, but prospective application is appropriate if the new decision overrules clear and settled law and thus establishes a new principle of law. See *Adams v Dep't of Transportation*, 253 Mich App 431, 435; 655 NW2d 625 (2002). *Knowles, supra*, was not clear and settled law, as evidenced by the first *Melton, supra*, decision that resulted in the special panel being convened to resolve the dispute.

The trial court erred in scoring OV 9 at ten points, and as a result, defendant's minimum term exceeded the properly scored guidelines. Defendant is entitled to be resentenced under properly scored guidelines.

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danger of injury or loss of life" was to be counted as a victim. MCL 777.39(2)(a). 2006 PA 548, effective March 30, 2007, amended MCL 777.39(2)(a) to provide that "each person who was placed in danger of physical injury or loss of life or property" was to be counted as a victim. This amendment became effective after sentencing in this matter, and nothing in the statutory language indicates that the amendment was meant to apply retroactively; thus, it does not apply to this appeal. See, e.g., *People v Thomas*, 260 Mich App 450, 458; 678 NW2d 631 (2004).

⁴ In his statement of questions presented, defendant asserts that trial counsel's failure to argue at sentencing that the trial court erred in scoring OV 9 at ten points constituted ineffective assistance of counsel. However, defendant does not argue the merits of this issue in the body of his brief. For that reason, we conclude that this issue is not properly presented for review. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

Vacated and remanded for resentencing. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ E. Thomas Fitzgerald

/s/ Kirsten Frank Kelly